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## Ethics: New Challenges for Attorneys Under the New Code

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## Ethics: New Challenges for Attorneys Under the New Code\*

*Hon. Steven W. Rhodes, Hon. Thomas F. Waldron,  
Prof. Erwin Chemerinsky, & Ms. Catherine E. Vance*

MS. VANCE: Thanks everybody, and thanks for coming. Just one quick note. If you have questions during the program, feel free to raise your hand. We will be taking them as the presentation continues.

And without further adieu, I want to hand the microphone over to Judge Waldron so he can set up our context and explain what statutes and rules it is we are talking about.

HONORABLE THOMAS WALDRON: Thanks everyone. There should be material that everyone has. We are going to sort of follow along with it. But if all we did was read the material to you, that's hardly a good idea. So we are going to jump around through some of it. It should be easy to follow.

For those of you who are visually acute, you can probably figure out from the slide already, it's a way of trying to look at what happened with the legislation. If you remember, when the '78 Act<sup>1</sup> came around, it simply displaced and repealed the prior legislation; the 1898 Bankruptcy Act<sup>2</sup>, the Chandler Amendments of 1938<sup>3</sup>. There may be some people in the room who were around for that, or pretty close, but a bunch of you would not have been.

The point is, we had a pretty smooth vehicle. Granted, we didn't know what every knob did and what every piece of control did. And from time to time the Supreme Court or the Courts of Appeals would tell us, "No, this does that." We would go, "What? After all these years, this is what it does?" But we would make an adjustment. Then what happened is instead of displacing that, all that happened is Con-

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\* This is an edited version of the transcript from the second panel at the DEPAUL BUSINESS AND COMMERCIAL LAW JOURNAL SYMPOSIUM, *Old Code, New Code: Views on Bankruptcy from the Bench and Bar*, held on April 27, 2006.

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

2. Bankruptcy Act of 1898, Pub. L. No. 55-171, 30 Stat. 544, *amended by* Chandler Act of 1938, Pub. L. No. 75-696, 52 Stat. 840, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

3. Chandler Act of 1938, Pub. L. No. 75-696, 52 Stat. 840, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

gress kind of went, and attached a side car. They didn't get rid of the car.

So for those of us who have been around for awhile, some obvious points: It won't fit where it used to fit. It doesn't drive like it used to drive. And if you operate it without thinking about which one you are driving, whether you are driving one or the other, you are going to have a wreck for sure. We can leave alone for a moment whether the side car makes it lean to the right or lean to the left. That's a political judgment you will each make. But the point is, it simply doesn't operate the way it used to. It has a whole lot of new parts. We don't know what they do. We just know that there's more things that can go wrong trying to drive it.

For today, there's a further step, though, and that is not only are you operating that vehicle, but whichever one you are operating, old code, new act, both of them, it's all within a bubble of ethics that surrounds it, that rides along with you whenever you are doing and operating it. And without stretching this too far, because it's really a full separate seminar, the model rules which govern almost everyone — there's only about three states left that have the model code<sup>4</sup> — the model rules of professional responsibility<sup>5</sup> sort of surround your every move on this.

And, again, without leaning too heavily on it, the point is, violations now, particularly of provisions of the Bankruptcy Act, the new Act — you know it's pronounced BAPCPA; a bunch of different ways of saying it. It's easiest for me to say "The Act." So I am talking about the Bankruptcy Reform, Consumer Protection, et cetera, Act of 2005; so "The Act."<sup>6</sup>

As that moves along, violations of it are now more clearly violations of applicable model rules of professional conduct. And the consequences — pick your own term — its preclusion concepts; whether you use *res judicata*, collateral estoppel or issue preclusion and claim preclusion. The point is, failure to do certain things under the Act in almost every reported decision I am aware of — not under the Act; under the Code, old law — in every state is an automatic violation. And the only thing that happens under state law is to try to figure out what this particular sanction or consequence is. So the old, "It's just a simple sanction hearing"; not a simple sanction hearing. It has very disastrous preclusive effects under applicable state standards governing professional conduct. And you will see in the material, I recite

4. MODEL CODE OF PROF'L RESPONSIBILITY (1980).

5. MODEL RULES OF PROF'L CONDUCT (2003).

6. 11 U.S.C. §§ 101-1532 (2006).

a bunch of the concepts and some of the model rules because they are generally more applicable. But the point is, all across the board and all around this new legislation, attention to detail and managing it is clearly the secret. It is, as of yet, pretty much undefined; that is, there's no reported decisions yet.

But because of the real huge body of case law that existed under the Code, we knew that, again, certain acts that were violative of the Bankruptcy Code also were automatically determined to be violations of some state professional responsibility provision. And all that happened was the state, on a separate track, made its own determination of a mild reprimand, a permanent suspension, a disbarment, or whatever it is.

So my point, again, is that the stakes are a lot higher, but the secret to it is, it is manageable. And if you have seen Cathy's book,<sup>7</sup> which is available for purchase out there, it's a detailed explanation of checklists, ways in which you would want to be sure there are safeguards and, perhaps, redundant backup systems that say, you gotta operate differently while this side car is around. You have to have additional safeguards as you practice things; everything from your first face time contact with the client to your final credit counseling session, in order to get the discharge. Just a series of new checklists and a time to change, if you have not changed, almost everything about your office practices.

MS. VANCE: And I think that we are already beginning to see where the new provisions of the Bankruptcy Code — and for those of you who aren't familiar, the statutes that we are talking about are set out at the very beginning of your materials. We are talking principally about Section 707(b)(4) of the Bankruptcy Code<sup>8</sup> and Sections 526 through 528,<sup>9</sup> which set out the debt relief agency provisions. We will talk about those more throughout this program. But the first thing I would like to have my panelists talk about is this notion that the statutes can possibly conflict with what's required of attorneys under state ethical rules.

We have two interesting cases that have been decided so far under the new law. One of them is *In Re Fawson*.<sup>10</sup> And, I'm sorry, but these aren't in the materials. But the cite is 338 BR 505. In *Fawson* — this is a Section 521 dismissal case. And if you are not familiar, just very briefly, there is a provision in Section 521 which requires auto-

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7. *ATTORNEY LIABILITY IN BANKRUPTCY* (Corinne Cooper & Catherine E. Vance eds., 2006).

8. 11 U.S.C. § 707(b)(4) (2006).

9. *Id.* §§ 526-528.

10. *In re Fawson*, 338 B.R. 505 (Bankr. D. Utah 2006).

matic dismissal of a bankruptcy case if certain documents aren't filed within a specific time frame.<sup>11</sup>

In the Fawson case, the particular set of documents weren't actually filed on time, and the attorneys — two cases consolidated for decision — the two attorneys argued that the case should not be dismissed because the failure to file on time was the result of excusable neglect.

Similarly, in *In Re Sukmungsa*,<sup>12</sup> it was a very similar situation, except it was a failure to file the certificate of credit counseling. Again, the attorney argued that the case ought not be dismissed because the failure to file the certificate was the result of excusable neglect. All of the attorneys — all of the debtors in these cases had their cases dismissed. The attorneys lost.

But our point here is, if an attorney makes an excusable neglect argument and loses, what happens to that attorney under the new provisions of the Bankruptcy Code, having been found to have committed neglect that is not excusable? Judge Rhodes, do you have an opinion on that?

HONORABLE STEVEN RHODES: Well, the circumstances give rise to the clearest possible conflict of interest because, on the one hand, the attorney as a fiduciary and as an attorney has an obligation to take all reasonable actions to advocate for and represent the debtor, and that includes getting the case reinstated by whatever legal means there are available.

On the other hand, of course, the attorney has a personal interest in protecting himself or herself from the statutory liability that we have under the new amendments in Section 526(c)(2)(B) and (C), which establish liability for the attorney when a case is dismissed for negligently failing to timely file the appropriate documents.<sup>13</sup>

I am wondering if in those circumstances, the attorney isn't obligated to withdraw because of that conflict. Tom, what do you think?

HONORABLE THOMAS WALDRON: These are some of the hardest issues that are floating around, despite the fact that Fawson is decided — and it's a 521 case, and it rejected all the arguments advanced by the attorney about excusable neglect, et cetera. Let me talk about it just for a second.

If courts, quote, "let attorneys off the hook" by attorneys being able to say, "Gee, Your Honor, I didn't know that was what the law required," you can see that that can't go anywhere. We punish everyone.

11. 11 U.S.C. § 521(i) (2006).

12. *In re Sukmungsa*, 333 B.R. 875 (Bankr. D. Utah 2006).

13. 11 U.S.C. § 526(c)(2)(B)-(C) (2006).

Everyone. We never accept the argument from someone, “Gee, I didn’t know the speed limit was only 40 here;” whatever it is. Ignorance of the law is no excuse, and that’s really a rock that’s just impossible to crack.

If we make that the rule for ordinary citizens in our courts, we certainly aren’t going to allow attorneys to say, “Gee, Your Honor, I didn’t know the law changed on me.” So from that point of view, the argument about excusable neglect can’t swing. I mean, that can’t be a principal argument that an attorney makes. And I guess one of the realities that has changed radically and is probably worth talking about still — because we are in the early stages of this. We really don’t have many reported decisions.

This is what used to happen, in my opinion, with that situation: “Gee, Judge, don’t blame my client because it didn’t happen. I will take the hit.” And then the Court didn’t hit him. I mean, that’s really what happened. You let the client off the hook and you also let the attorney off the hook almost with an, “Oh, gee, thanks for kind of falling on your own sword for us and not burning your client. You are a heck of a guy, so we are not going to get you either.”

Well, what’s happened, unfortunately, in 526 sections<sup>14</sup> are that all the may’s became shall’s along with Congress’ overall desire to limit discretion for bankruptcy judges, particularly in the new legislation. So the way in which I think the arguments have to be made are, first, statutorily based. This can’t be a shock as a matter of theory, but as a matter of practice, I understand that isn’t the way that arguments are generally couched to bankruptcy courts. They float along at terrible spectrum from, “Gee, I happen to have the law on my side” to “Couldn’t you do some equity in this case, Your Honor,” meaning, I have no idea what’s going to happen. Somewhere in that spectrum, the shift has to go to, “Hey, this is what 526 says and this is what 521 says. And here is why 521 isn’t applicable;” a good approach. Or if you are just stuck as, apparently, Counsel was in this case, then the argument would be, in 526, there are some fungible words. One of them is “material requirements of this title.”<sup>15</sup>

So maybe that wasn’t a material requirement of the title in this particular case. Maybe it’s amendable in some other way. Maybe I can refile again without any real prejudice. Maybe there’s a bunch of things I can do. My point is not to try to solve what happened in a reported case already or spend much time criticizing it, although, I

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14. 11 U.S.C. § 526(c)(2)(B)-(C) (2006).

15. *Id.*

personally think that the result might not have been appropriate in that case. That's beside the point.

The point is to try to suggest that from that case, the things to learn are, you need to go after the predicate Statute 521 or you need to go after 526 to find some other way out of it, other than, gee, let everybody off the hook today, Your Honor, because that's not going to happen. Erwin, I see you shaking your head.

PROFESSOR CHEMERINSKY: I pretty much agree with you. I just want to say a few things. First, I have no doubt that federal law here can trump the State Rules of Professional Responsibility to the extent there's any conflict between them. Federal courts have always adopted the Rules of Professional Responsibility for practice in federal court, but sometimes federal courts in their own local rules have created additional or even conflicting obligations. And to the extent that federal law is specific here, it's going to take precedence when you are practicing in bankruptcy court or under the State Rules of Professional Responsibility.

Second, I am very disturbed by 526(c)(2)<sup>16</sup> where it creates attorney liability. This goes beyond the kind of sanctions under Rule 11<sup>17</sup> or the corresponding rule that's always been there under the federal bankruptcy law. This really does create a kind of attorney liability that I can't think of in any other area of the law. And it's worth trying to think about whether or not there's some possible challenges that might be brought to it or ways of limiting its application.

And, finally, I agree very much with Judge Rhodes in terms of there being a conflict of interest, but if the attorney is not excused, I think there's only one solution for that attorney under the Law of Professional Responsibility; the lawyer has to do what best protects the client's interest. And what best protects the client's interest is saying that, "You should excuse the client here because of my mistake," even if that means the lawyer is going to be personally liable. I think that's what the lawyer has to do under those circumstances, if the lawyer hasn't been excused, because the lawyer's first obligation is zealous representation of the client.

HONORABLE THOMAS WALDRON: And sort of one of the horrors that comes along in this and the way it all interrelates is, you are aware that now the stay, arguably, expires in 30 days in certain circumstances or doesn't apply at all in other circumstances.

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16. 11 U.S.C. § 526(c)(2) (2006).

17. FED. R. CIV. P. 11.

One of the, quote, “ways out of that” is to show that the dismissal that occurred in the prior case occurred as a result, not in the negligence of the client, but of the negligence of the attorney.

So when the person comes into your office, although there has been this general, sort of, reluctance to rat out some other attorney; “Gee, the way I help my client is to point the finger at some other attorney and say they are responsible for some terrible things.” Again, within this range of competency, including both under the Model Code and under Canon — under Canon 5 of the Model Code or under the Model Rules, the lawyer’s duty to represent the client zealously,<sup>18</sup> if one of your client’s defenses is, because exactly like in the Fawson case,<sup>19</sup> it got dismissed because the attorney blew it, I probably have a duty to tell the Court that the reason my client still has the stay and it’s not going to expire is because it was negligence on the part of the other attorney, and the other attorney conceded it or should have conceded it in that case before me.

Do I like to do that? No. Is it somewhere within the ambit? Yes. How can you say I have an available option for my client but I am not going to exercise it because I like Ed or Jane, or whoever it is? Sir, I see your hand.

AUDIENCE MEMBER: Does the attorney have an obligation then to report it to his errors and omissions carrier?

HONORABLE THOMAS WALDRON: Worse, do you have a duty to report it to your state authority that regulates attorneys? Because every state authority that regulates attorneys requires you to bring to their attention violations of the applicable Codes of Professional Responsibility.<sup>20</sup> So it’s a both kind of thing.

AUDIENCE MEMBER: Not in Illinois. We only have an obligation to report certain violations if they involve moral turpitude or — not any violation.

PROFESSOR CHEMERINSKY: Serious misconduct.

HONORABLE THOMAS WALDRON: My case got dismissed. What? Not serious enough? Ask the client.

AUDIENCE MEMBER: Wait a second. Criminal conduct; things of that nature.

MS. VANCE: I think one of the things that can happen with this, and I think what frightens attorneys the most under any construction

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18. MODEL CODE OF PROF’L RESPONSIBILITY Canon 5 (1980).

19. *In re Fawson*, 338 B.R. 505 (Bankr. D. Utah 2006).

20. *See* MODEL RULES OF PROF’L CONDUCT R. 8.3 (2002).



of the policy is that the first real decision that we get under any of these statutes is the type of attorney who deserves it.

I think the courts would have — and I can't speak for the courts, since I am surrounded by two of their representatives. But I think that the courts who have an attorney that really is trying to fulfill his or her obligations to the client, and if in fulfilling those obligations it compels in some way a violation of a statute, I think it's hard for me to imagine that judges would be trying very hard to penalize these attorneys.

Judge Rhodes, what would you do in such a circumstance?

HONORABLE STEVEN RHODES: It's very interesting. In the first six months under the Code where I have seen several attorneys make these kinds of mistakes resulting from their lack of knowledge about the Code, and I have seen the resulting dismissals and other kinds of prejudice to their clients, I have not seen a single enforcement action under Section 526 or any of the other sections yet at all.

Having said that, the language in Section 526 is mandatory.<sup>21</sup> But if you look at the sanction that's mandatory, it turns out to be pretty light. The injured party gets actual damages,<sup>22</sup> which would be, what, the filing fee for having to file the second case because the first one got dismissed?

HONORABLE THOMAS WALDRON: Unless the person has an attorney and wants an attorney to file it for him.

HONORABLE STEVEN RHODES: Attorney's fees, you know, which might be, what, \$500 or \$800 for a second Chapter 7?

HONORABLE THOMAS WALDRON: Unless they lost a house as a result of that.

MS. VANCE: We had that case with the counseling decision, where the Court — I forget which court it was — but the Court held that without the counseling, the case was a nullity. And in the meantime, Ameriquest came and took the house.

HONORABLE STEVEN RHODES: Was that a Chapter 13?

MS. VANCE: No, it was a Chapter 7, but the foreclosure was not a violation of the stay because since the debtors were ineligible because they didn't have credit counseling, their case never existed.

HONORABLE STEVEN RHODES: You can see what the attorney is going to argue; well, they would have lost the house anyway, so no harm, no foul, no proximate cause.

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21. 11 U.S.C. § 526 (2006).

22. *Id.*

HONORABLE THOMAS WALDRON: I don't want to miss that errors and omission issue, which is, I don't know whether or not that blocks your next attempt to get coverage, whether it increases your premium.

I know that for awhile there was a big issue about errors and omissions, about bankruptcy malpractice coverage for awhile, at least there was in Ohio. It got obviated, and everybody is able to get in. But there was a real period where that was not clear. And as I traveled around the country, other jurisdictions would report the same problem.

As I understand now, it is not a problem. Coverage is still available on bankruptcy.

PROFESSOR CHEMERINSKY: One other thing about the inner section of 526 and state laws, professional responsibility. In many states, judges are required to report sanctions above a certain amount to the state bar. In California, any sanction imposed by a judge greater than \$500 is to be reported to the state bar.

Assuming that applies to bankruptcy judges, I think that means if you impose something greater than \$500, say, in California, under 526, you are required as a judge to report that to the state bar.

MS. VANCE: Which would be your fee.

HONORABLE STEVEN RHODES: Here is another question for you: 526, 527, and 528 require the attorney to make many, many disclosures to the prospective client or — I guess they call them assisted persons. They used to call them clients; now they are assisted persons.

If an attorney negligently causes the dismissal of a case, does that attorney have an obligation to disclose to the client that they have these remedies under Section 526 against the attorney for actual damages, attorney fees, et cetera, et cetera?

MS. VANCE: Judge Waldron.

HONORABLE THOMAS WALDRON: I got nothing on that one, only because we are all speculating at this point. You know that there was a bar that grew up; the malpractice bar. I mean, I have been around since 1967. There was no malpractice bar, essentially. You just couldn't find the people. Then by the time the '70s came, you knew who they were. By the time the '80s came, they were pretty organized. By the time the '90s came, they had their successor firms that have been around for 20 years.

This is, clearly, an undiscovered treasure trove of potential malpractice claims. Will they develop that the way they have developed other malpractice claims? I am talking about legal malpractice claims. Will

they? I don't know. But that's clearly a question within two years and four years to take a look at because, again, the setup for this is just, really, right across the plate. You shouldn't be able to miss this ball when it comes down. It's just set up that way. Will it happen? I don't know.

MS. VANCE: I think we have gone a little beyond our topic here. Like he said earlier, a subject for another program is it could very well be that these violations of these statutes, if they occur pre-petition, are property of the estate, and it's the trustee who will actually go after the attorney.

Sir, you had a question.

AUDIENCE MEMBER: A comment and a question. I sit on our Grievance Committee, and I know the policy of our Grievance Committee, like many others, whether it's right or wrong, is that if somebody commits malpractice, and doesn't do anything else to add to it, doesn't lie to his client, doesn't claim to have filed something that he didn't, quite often that is not prosecuted as a grievance.

The other comment, Judge Waldron, in terms of a bankruptcy malpractice bar; in many cases, the damages are going to be fairly de minimis, other than in Cathy's Ameriquest scenario. You are not going to get a lot of guys jumping up and down to make a thousand dollars, I don't think.

HONORABLE STEVEN RHODES: I would like to comment on your comment, and actually object to it vehemently because malpractice is incompetence.

AUDIENCE MEMBER: I understand that.

HONORABLE STEVEN RHODES: And attorneys are required by the model rules to be competent. And when you are not, it's a violation of that, and ought to be, in appropriate cases, the subject of action. Incompetence causes clients as much harm and prejudice as the kinds of violations that you do pursue.

AUDIENCE MEMBER: I would like to comment on that. Blowing a deadline is something completely different. I doubt that there is a lawyer in this room who has not on at least one occasion during his or her practice blown a deadline. And that doesn't make a lawyer incompetent.

AUDIENCE MEMBER: Speak for yourself.

AUDIENCE MEMBER: I am.

MS. VANCE: I can tell you the conduct in the Fawson case, that the Court didn't actually get to excusable neglect because the Court held it didn't have jurisdiction to even decide because the case was

gone.<sup>23</sup> But the conduct that the attorney asserted was excusable neglect was that he sent the payment advices to the trustee and the United States Trustee instead of filing them with the Court, which —

AUDIENCE MEMBER: I don't mean to belabor the point, but if under the ethical — the provisions of the Illinois Code of Responsibility,<sup>24</sup> which I have some modicum of familiarity with, if the lawyer has committed an act that is a violation of the rules, he cannot correct it himself. The client has to be directed to a third party or another attorney. He can't settle it or work it out with his client. That's additional malpractice.

So that means another lawyer has to be brought into the picture, an additional cost, to straighten out or try to straighten out what he's done. There's no choice of saying, "I will fix it." That's like blowing a statute and trying to pay off a client. You can't do that. So I don't know how you get around this —

MS. VANCE: Professor Chemerinsky is going to help us with getting around some of them. And I want to thank you for giving me such a terrific transition, because another case that has been decided is *In Re McCartney*.<sup>25</sup> And in *McCartney* there was a direct challenge to the validity of the debt relief agency provision under the Constitution.<sup>26</sup> And we are lucky enough to have the foremost expert on these provisions, the constitutionality of these provisions here on this Panel.

So Professor Chemerinsky, could you tell us about the case of controversy and a little bit about what happened with *McCartney*?

PROFESSOR CHEMERINSKY: Thank you for the comments. I think there's some serious First Amendment problems with the new Act.<sup>27</sup> One of them is the requirement that individuals identify themselves as debt relief agencies. The Supreme Court has said that advertisements are protected by attorneys, so long as they are truthful and not deceptive. The Supreme Court has also said that compelled speech violates the First Amendment.

And so here, the requirements of compelled disclosures, compelled statements seem, to me, to raise serious First Amendment problems. I think you can read the statute as saying that in certain circumstances, even creditors' attorneys are going to have to self identify as debt relief agencies, and I think that's the strongest possible challenge to this.

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23. *In re Fawson*, 338 B.R. 505 (Bankr. D. Utah 2006).

24. See generally ILL. CONST. art. VIII.

25. *In re McCartney*, 336 B.R. 588 (Bankr. M.D. Ga. 2006).

26. *Id.*

27. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

MS. VANCE: For those of you in the audience that aren't familiar, there is a statement specifically required of these debt relief agencies.<sup>28</sup> In any advertisement it must state, "We are a debt relief agency. We help people file" — what's the phrase — Judge Rhodes was kind enough to provide us with some examples, which he will share later.

"We help people file for bankruptcy relief under the Bankruptcy Code."<sup>29</sup> Every advertisement is supposed to say that. Sorry for the interruption.

PROFESSOR CHEMERINSKY: That's what I am speaking of. And to the extent that the ad is truthful and not deceptive without this language, then it seems protected by the First Amendment. To the extent that it is compelled speech, I think it raises serious First Amendment questions, and particularly for those who would not reasonably be thought of as a debt relief agency. To force self identification as such seems, to me, to raise serious First Amendment problems.

I want to put on the table one other First Amendment issue of a different sort — we may want to talk about it separately — and that's the prohibition of lawyers encouraging clients taking on debt. Even if it is completely lawful debt under the Act, there's limits on the ability of lawyers to give that advice to clients.

I think that restriction on professional communication, accurate professional communication, raises very serious First Amendment problems.

Judge Rhodes, I think you and I disagree as to some of this.

MS. VANCE: Could you give us some background on the Supreme Court authority, the Shapero decision,<sup>30</sup> and advertising?

HONORABLE STEVEN RHODES: Well, it's a little bit intimidating for me to be talking about Supreme Court constitutional decisions in the presence of the country's most recognized expert, but I will give it a shot. It's been so interesting to me from just a political and, sort of, sociological perspective, how we got here.

How did we get Sections 526, 527, and 528?<sup>31</sup> I thought it began with the Supreme Court case of Shapero versus Kentucky State Bar.<sup>32</sup> In that case, the law firm wanted to send letters to people whose homes were in foreclosure, advertising their Chapter 13 practice so

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28. See 11 U.S.C. § 528(a)(4) (2005).

29. *Id.*

30. *Shapero v. Ky. Bar Ass'n*, 108 S.Ct. 1916 (1988).

31. 11 U.S.C. §§ 526-28 (2005).

32. *Shapero*, 108 S.Ct. at 1916.

that they could get clients.<sup>33</sup> And Kentucky had some kind of a rule, which was in flux, prohibiting that, and the Supreme Court held that that kind of commercial speech, not otherwise false or misleading, was protected by the First Amendment.<sup>34</sup>

And as you go into that case, it actually relies on a prior case called *Bates versus Arizona State Bar*, which held that attorney advertising which was not false or misleading, was also protected by the First Amendment.<sup>35</sup>

Well, in the bankruptcy context, what these two decisions meant, of course, was that people whose homes are in foreclosure get flooded with letters from Chapter 13 lawyers in the community offering their services. The newspapers have ads by bankruptcy lawyers offering bankruptcy services, and the economic reality of all of that public competition in the marketplace is to drive down the price of that service and to drive it down so low, at least in my view, that the price does not cover the cost of the services that are necessary in order for the attorney to competently perform the service.

And so for years it was my experience and that of many others — I will let Judge Waldron speak for himself — that the work of attorneys in bankruptcy cases was not, in some cases, more than — more than there should have been, not sufficient representation. And Congress hears about that, and that's why there's a straight line from *Shapero versus Kentucky*<sup>36</sup> and *Bates versus Arizona*<sup>37</sup> to Sections 526, 527, and 528.<sup>38</sup>

In *Bates*, the State Bar had advocated to the Court several justifications for why attorney advertising had to be prohibited, and the Court rejected them all.<sup>39</sup> The State of Arizona, however, did not foresee this problem. It was not directly one of the ones that it asked the Court to consider. So I think that's how we got to Sections 526, 527, and 528.<sup>40</sup>

Now, having said that, I am inclined to agree that on several counts, these sections overreact to the problem, in some ways grossly and unconstitutionally so. But I will tell you this: Professor Chemerinsky asks, why on earth would Congress require attorneys to disclose to their clients, "We are a debt relief agency; we help people file for

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33. *Id.*

34. *Id.*

35. *Bates v. State Bar of Ariz.*, 97 S.Ct. 2691 (1977).

36. *Shapero*, 108 S.Ct. at 1916.

37. *Bates*, 97 S.Ct. at 2691.

38. 11 U.S.C. §§ 526-28 (2005).

39. *Bates*, 97 S.Ct. at 2691.

40. 11 U.S.C. §§ 526-28.

bankruptcy”? How dumb is that? Well, here is the answer: I have had many more than one person come into my court in my 20, whatever it is, years on the bench, and say to me, “I didn’t know I filed bankruptcy. Nobody ever used that word to me. I thought I was using a federal program to save my house. I didn’t know it was bankruptcy,” and credibly so.

If you look at some advertising before the Act,<sup>41</sup> there would be this attractive young woman jiggling the keys to this brand new car and, “Attorney X helped me to get rid of my debt so I could buy this new car,” right? You would see these ads on late night TV, not mentioning bankruptcy, not mentioning or, you know, even suggesting the consequences of a bankruptcy. So go for it.

PROFESSOR CHEMERINSKY: We disagree, although I don’t know we disagree as to the ultimate constitutional question. First you say that you saw as a bankruptcy judge a lot of attorneys who weren’t fully competent. Undoubtedly, that’s a problem in bankruptcy court and all courts. I question that that’s because of the attorney advertising. I think if there was no attorney advertising at all, I don’t think you would be seeing more competent lawyers in bankruptcy court or any other court. I think there is a problem that lawyers vary enormously in quality, but I don’t think the amount of advertising has anything to do with it.

In terms of the fact that advertising may have lowered costs for consumers, well, that may be a good thing rather than a bad thing. And, again, I don’t see any evidence that this has driven good lawyers out of being able to practice in the bankruptcy law area.

With regard to Congress requiring that lawyers disclose that they are bankruptcy, the problem is how the law is written. I think there’s a reasonable reading of the law that even some creditors’ lawyers are going to have to call themselves debt relief agencies, and that does raise implications of the First Amendment.

If I could borrow your ads for a second. I hadn’t seen this before. It says, “A1 Affordable. Bankruptcy, lowest rates. 17 years of experience. Call this number.” I don’t see any problem with that as an ad to have somebody call. I don’t see anybody jiggling anything in it, or anything like that. It just says, you know, “A1. You can still file bankruptcy. Call for a free consultation and a fresh start.”

MS. VANCE: But what doesn’t the ad say?

PROFESSOR CHEMERINSKY: But it’s an ad.

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41. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

HONORABLE STEVEN RHODES: There are several interesting things — this is out of the Detroit news on Monday. This is a recent photocopy.

There are 11 ads for bankruptcy lawyers here. Some of them are actually duplicates, for whatever reason. The one in blue there in the middle, which happens to be the biggest one, is the only ad that has the required statutory language for debt relief agency advertising. The only one. So here we are, six months after the Act<sup>42</sup> took effect, and one out of 11 lawyers or one out of 11 ads that lawyers have contracted for, have the required language. So for whatever reason, we aren't having enforcement of this.

But beyond that, if you read Bates<sup>43</sup> and Shapero<sup>44</sup> very carefully, when they deal with this issue of, is the practice of law a business or a profession, right — because if it's a business, it has rights of commercial speech. One of the things that both courts talk about is the ability of the profession to regulate itself and to address issues of competence. And, yet, here we were today told that state bars are not interested in regulating competence.

PROFESSOR CHEMERINSKY: Let me add, if this is an issue that you have to deal with, the Supreme Court has said in many other cases, besides just Bates<sup>45</sup> and Shapiro,<sup>46</sup> that attorney advertising is constitutionally protected so long as it's truthful and not deceptive.

So you look at the Peel versus Illinois State Bar case<sup>47</sup> or you look at the case *In Re RMJ*.<sup>48</sup> All of those cases stand for that proposition. And should you be in a situation where you need to or want to bring a challenge to that part of the new Act,<sup>49</sup> I think there is a strong ground for doing so.

And also, I don't think that the speaker said that the State Bar is not interested in regulating competence. I think what the speaker from the audience said was it's not that every instance of malpractice is itself worthy of discipline by the State Bar. That's very different than saying bars aren't interested in regulating competence.

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42. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

43. *Bates v. State Bar of Ariz.*, 97 S.Ct. 2691 (1977).

44. *Shapero v. Ky. Bar Ass'n*, 108 S.Ct. 1916 (1988).

45. *Bates*, 97 S.Ct. at 2691.

46. *Shapero*, 108 S.Ct. at 1916.

47. *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990).

48. *In re R.M.J.* 102 S.Ct. 929 (1982).

49. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.



MS. VANCE: I would like to shift gears after we take that question in the back.

AUDIENCE MEMBER: In the state of Florida – I practice in Illinois, but I understand for the state of Florida, they have a provision under the state law, state bar, that every ad must say, “This is an advertisement which may not be true. We will be happy to send you information by mail, and you decide.”

Now, let’s apply that to what you are talking about. A bankruptcy lawyer in Florida advertises they are a debt relief agency and they are helping people get into bankruptcy. In Florida, I would assume they would have to have that legend also in the ad because the Florida Bar might come after them. And believe me, for those of you who might practice in Florida, they don’t give a darn about federal laws; they care about the Bar of Florida, okay. Now, what do you do in those situations?

HONORABLE THOMAS WALDRON: I only want to say I am unaware of that, and I have recently, in some other material for another seminar, went through a recent decision from the Florida Bar Association that banned an advertisement that had a pit bull on it with a collar; a big case that went through the Supreme Court.<sup>50</sup> There was no such disclaimer on that ad, and there was no mention by the Florida Supreme Court of any requirement such as you described.<sup>51</sup>

I am not trying to challenge you on it because I am not familiar enough with the details, but I am telling you the most recent Supreme Court case made no reference to that, and there was no such disclaimer. So either that may not be applicable law any longer or it just may not be something the Supreme Court of Florida is paying any attention to.

PROFESSOR CHEMERINSKY: My answer to your question is I think you have to comply with that or bring a challenge to it or violate it, take your chances, and then hope you can, as a defense, raise a challenge to it. I think those are your only options.

I think the safest, if you don’t want to comply with it, is bring a declaratory judgment action, and have it declared unconstitutional as violating the First Amendment.

AUDIENCE MEMBER: Judge Rhodes stated before that he had people come to you and say they didn’t know they filed bankruptcy, and that’s the reason for this advertisement.

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50. *The Florida Bar v. Pape*, 918 So.2d 240 (Fla. 2005).

51. *Id.*

In all due deference, the petition itself the debtor has to sign makes a distinction of between the chapters. And there may be some attorney who just forced people to sign. First of all, if the debtor doesn't understand what he is signing, sometimes it may just be the debtor's fault, not the advertisement's fault. And sometimes you do have debtors that just don't know what they are doing.

You can't blame the attorney because the debtor doesn't know what he is doing, even though the attorney has explained it to the debtor many times. I don't think that's an excuse for adding advertising that's unnecessary or improper.

MS. VANCE: I think Judge Rhodes was trying to give some perspective, because if you read through the legislative history and National Bankruptcy Review Commission report, you will see that this is the kind of conduct that they were talking about. And that's really what a lot of these are premised on. But I need to move this on.

AUDIENCE MEMBER: I want to — you are kind of preaching to the choir, because I am sure every attorney in here takes a great deal of time to explain to their clients what they are doing when they are filing bankruptcy.

I am not telling you that there aren't attorneys that don't do that, but this group probably does, and it's unnecessary in that regard. And I think that you do have to put some responsibility on the debtor for the debtor to know what they are doing.

MS. VANCE: I want to shift gears a little bit, because in terms of the things that attorneys do that may or may not be appropriate, Judge Waldron is going to talk a little bit about temporary contract and appearance attorneys in bankruptcy cases.

HONORABLE THOMAS WALDRON: Let me try to stop for a second and say I recognize that we are probably talking — this is one of the problems with these seminars. Everyone at these seminars suggests to every panel that talks about ethics, "Hey, Judge, the problem is the people in the room are okay. The people who don't come to these things are the ones you need to talk to." And you can, sort of, see the self-defeating logic of that, right? We would never have a program because they would never come. That can't work.

I think what we are trying to suggest in here is not that there's something wrong in this room, a matter about which we would have no knowledge, but there is a new set of statutes that need a new approach, and that state bars, in fact, have no concern for whether or not there is a new statute in place or not. They independently often simply take their own action based on a bankruptcy court decision — it's

that simple — and that a new land mine has opened up in bankruptcy practice that would allow this to happen much more easily.

And the things I am going to talk about, again, may not be particularly applicable. The point is that attorneys now nationally have tried to address this issue in a couple of ways. I don't know, there may or may not be a large number of contract, temporary or appearance attorneys here.

In some states there are attorneys who have no client base. They have none. The only clients they ever have are clients that are referred to them by another attorney. They make an appearance, first day hearing. They make an appearance at a 341.<sup>52</sup> They make an appearance — this is pretty much a national phenomenon. Simple point with regard to it: A, it requires informed consent from a client ahead of time to avoid all of the state court professional responsibility issues, and B, it requires disclosure from the attorney in front of the Court if there's any sort of legal fees.

Add to that all the complexity of 526, 527, and 528,<sup>53</sup> so that if you are the initial attorney who had the client contact, but you aren't that person, you are merely the contract, temporary or appearance attorney, however you characterize yourself, you have now clearly become a debt relief agency, because that simply transfers to you.

So you have either a great level of assurance and confidence [in the original attorney who sent the case to you, that there's no exposure you have as a result of that, or as the initiating attorney, you have great confidence in whoever the temporary, contract or appearance attorney is, that they will be doing a bang-up job, and there's no way that that's going to come back to haunt you, and in all cases, you have satisfied whatever the requirement is under your state code or rules for professional responsibility in terms of an informed consent. A more complicated area than it used to be. Along with that, the next area is to try to limit representation.

**HONORABLE STEVEN RHODES:** Before we go there, doesn't the appearance attorney, as a debt relief agency, have the same obligations of disclosure and the written contract and the delivery of the written contract parallel to the original attorney, and can't simply rely on the fact that these disclosure obligations were carried out by a prior attorney?

**HONORABLE THOMAS WALDRON:** That is the risk; that is, are you sure that whoever sent you the case did all the right things?

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52. 11 U.S.C. § 341(2005) (regarding meeting of creditors and equity security holders).

53. 11 U.S.C. §§ 526-28 (2005).

Are you going to do them again yourself to make sure that, at least with regard to your portion of it, they are or aren't? Is there really a relationship there?

My point, again, about managing this is, if you don't have written contracts that govern these kinds of referrals, does this mean now that if suddenly there was a car accident for one of the people in your office, and you missed a hearing and somebody handled one hearing for you on a Tuesday afternoon — I don't think that's going to be a problem. At least I would hope not.

But on a regular basis, are you on one end or another of this kind of a conduit arrangement? If yes, you need to change, in my opinion, all of the paperwork that governs the responsibilities among yourselves. And the earlier cites and the cites in the material — articles that are around on that and some case decisions, et cetera, limited representation is another one. I am just trying to hit a couple issues before we go. That is — across the nation has sprung up. I am not going to sign re-apps. That is something I am not going to sign. I am not going to do this. I am going to limit this. There is a whole separate issue, again, that we wouldn't have time to discuss today that has to do with unbundling. It is a state issue, not a federal issue. It's a professional responsibility issue. And the good idea behind it was, hey, we don't have to bill a person for \$1,000 worth of services if we have an informed decision that says I would only like \$500 worth of services. A good idea.

Some state disciplinary authorities, whether they are run through the Court or an independent agency, said, hey, you can do that. You can limit your — and unbundle your services. The problem is you cannot in any reported decision I am aware of yet from bankruptcy judges, under the former Code, not under the Act yet, you can't unbundle any kind of court proceeding. And that certainly extends through all the reaffirmation agreements, since it's an absolute obligation in every case to say, what are you going to do with the secured property? Are you going to reaffirm? Are you going to redeem? Are you going to surrender? Are you going to hope that the whole pay-and-drive thing is going to work?

Whatever it is, you can't unbundle that and, in general, you can't unbundle services. Can you limit them? Yes, you can. Let me have one more, and then we will try to take as many questions as we can.

The next one is, hey, guess what, I am really not going to represent the person. I am going to sort of do some work on the petition and all the rest of the stuff, and the person is going to go in pro se. Well, you gotta get your hands in it somewhere. You put your thumbprints on

it; you are in. You are in all the way. You are in to disclose. You are in to appear. You can't shirk it and you probably can't unbundle it.

Again, you can take a look at those two cases that are Code cases. The body of law — I am unaware of anything that goes in the other direction. There are appellate decisions that talk more about briefs. These are the bankruptcy court decisions. The point is, just kind of writing it up, sending the person off on their own, probably not only wrong from a bankruptcy point of view, it runs into all those state professional responsibility rules.

MS. VANCE: There's also a really good discussion. Tom Yerbich, who is in Alaska, has written an awful lot about unbundling, and he has a chapter in the book, and it's really a good chapter.

Questions?

AUDIENCE MEMBER: I want to go back, Judge, to the notion of the contract attorney. Is that more problematic if that contract attorney is going to 341<sup>54</sup> meetings for a debtor's attorney than if he's appearing in front of the Court on a relief from stay or an objection to confirmation?

It seems, to me, it is because we are not clear yet that the creditor's side attorney is a debt relief agency.

HONORABLE THOMAS WALDRON: I was with you until I got to the end. The contract attorney is appearing on behalf of the debtor?

AUDIENCE MEMBER: No, the contract attorney is appearing on behalf of —

HONORABLE THOMAS WALDRON: The creditor?

AUDIENCE MEMBER: The big bank.

HONORABLE THOMAS WALDRON: No, Steve may have a different opinion, but I think, in general, you are probably all right. Certainly, in the 11's there is not even an issue for a bunch of other reasons that don't have to do with contract attorneys or debt relief agencies, and even on the ones where you are representing the landlord, which seems to be the biggest exposure you have to be a debt relief agency under the definition.

AUDIENCE MEMBER: No, where it happens is the big foreclosure — the big statewide foreclosure firms don't have an attorney in every jurisdiction.

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54. 11 U.S.C. § 341.

**HONORABLE THOMAS WALDRON:** Here is the risk on the foreclosure ones: If you talk only, in my opinion — this is only Waldron on thin air. You can say, “That wasn’t very helpful.”

If all you are doing is talking about your client only, maybe you are okay because of the way the debt relief agency definition is under 101(12).<sup>55</sup> If you tell the client, even though you are only talking about yourself, that a 13, which is going to clearly involve other kinds of relief beyond just you — if you are the only creditor in the entire case, and the debtor doesn’t have any other car problems or any utility problems or any other problems that are going to be impacted, you are probably not a DRA. You are probably safe on that one.

But when you start to talk about any possibility of reorganization that impacts other creditors, you probably rendered the kind of bankruptcy advice that’s going to expose you to the DRA restrictions. So that’s a difficult issue. So I don’t know. That one is a hard one.

Go to a 341<sup>56</sup> meeting and tell him, “The way out of this is such and such,” or, “Why don’t you handle our claim by doing this? Why don’t you amend your plan so that you do the following things?” Sounds like you are way close to the debt relief agency definition. I don’t know if that’s —

**PROFESSOR CHEMERINSKY:** Can I add one thing about the limited representation? Because this is a place where there is a large body of law under the rules of professional responsibility, and I don’t think that they are different than the law with regard to bankruptcy.

Traditionally, the law here has been that the burden is on the lawyer to do three things; first, to clearly inform the client in a way the client can understand of the limited scope of representation; second, getting the informed consent from the client; and third, the lawyer has the duty to make sure that it’s possible to effectively represent the client’s interests while taking on limited representation.

So when I handle appeals for people, I will often say to them, “I will handle this at the appellate process, but if it gets remanded to the trial court, I am not going to represent you.” It’s my duty to explain that to them. I put it in writing. I have to be sure that I am not prejudicing them by doing that. I think the problem in the bankruptcy context is, is it possible to limit representation in a way that wouldn’t inherently undermine the client’s interests or put them in jeopardy? And I think that’s where the real issue comes in.

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55. 11 U.S.C. §101(12A) (2005) (defining “debt relief agency” as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110. . .”).

56. 11 U.S.C. § 341.

HONORABLE THOMAS WALDRON: And that's what the decision is saying in the material.

Can I move to the next one real quick?

MS. VANCE: Of course.

HONORABLE THOMAS WALDRON: And this, again — you can say, “Hey, this is more Waldron on thin air.” But the 526<sup>57</sup> issues — and we are going to sort of conclude with this. Let me move, actually, to the next slide.

It's the new terms; the new terms that are in 526, and you will see them up there. They are reasonable inquiry, reasonably diligent inquiry, reasonably sufficient information, blah, blah, blah, blah, blah.<sup>58</sup> Let me go back a slide.

MS. VANCE: There is a list of all of those in your materials of varying standards.

HONORABLE THOMAS WALDRON: Sorry, I need to back up a slide or two.

While I am doing that, what happened was, from my point of view — this is, again, just simply something to consider as you argue about these issues. Congress gave up federal rule making authority. They did it when they enacted the rules enabling legislation. They cannot change the rules of bankruptcy procedure. So among the other — you are aware there's some uncodified sections of BAPCPA;<sup>59</sup> that is, it never made it into the statute. They are just in the statute. They are effective federal law, but they are not codified anywhere in the new Act. They don't have a section number. They have to do with tax returns and some other things.

There's also something called a sense of Congress. It appears in Section 319 of BAPCPA,<sup>60</sup> the actual language. And it was simply a direction that said, “Hey, we want you guys to change 9011<sup>61</sup> because we can't do that anymore; your friends at Congress.”<sup>62</sup> What Congress has, of course, is the power to reject recommendations from the

57. 11 U.S.C. § 526 (2005).

58. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. § 526).

59. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

60. *Id.*

61. F.R.B.P. 9011.

62. *See* 11 U.S.C. § 319 (2005) (“It is the sense of Congress that rule 9011 of the Federal Rules of Bankruptcy Procedure (11 U.S.C. App.) should be modified to include a requirement that all documents (including schedules), signed and unsigned, submitted to the court or to a trustee by debtors who represent themselves and debtors who are represented by attorneys be submitted only after the debtors or the debtors' attorneys have made reasonable inquiry to verify that the information contained in such documents is (1) well grounded in fact; and (2) warranted by

Supreme Court after they have gone through the rules-making process, and they are about to become new bankruptcy rules. Congress has the right to go, “No, not that rule.” They almost never exercise that but, nevertheless, that’s the way it works.

So my suggestion is that a principled argument exists that all of the new language in 526<sup>63</sup> that has to do with inquiries by a definitional section and definitional analysis, and we know from Supreme Court decisions, got a new word, it’s undefined in the statute; grab a dictionary off the shelf, open it up, and see what it says — and they cite the different dictionaries by name so you can do that — that all of that language is consistent with the same language that existed in 9011.<sup>64</sup>

So you have a body of law that is already available to you to interpret the provisions about inquiry, reasonable inquiry, reasonably diligent inquiry, et cetera, and that that body of law is 9011.<sup>65</sup> And the sense of Congress that they couldn’t change 9011<sup>66</sup> and asked that it be changed supports the argument that all they wanted to do was not create an entire new body of law that we are going to have to start from scratch with, but simply to, say, poured over the decisional authority and bodies of law that exist with regard to 9011<sup>67</sup> as you take a look at all of the new language that’s in 526,<sup>68</sup> et cetera. And so when — the way that plays out is, as you begin your checklist — and, again, Cathy’s book is particularly valuable in this sense; how to manage all the new data that you have to work with, and particularly because it’s so front-loaded.

And so my thesis, essentially, is that every bar, using Elizabeth Warren’s idea of local legal culture — every bar is going to determine what reasonable inquiry is and what meets those standards; that there is not a floor, except the floor that’s established. And now not the people in the room — I’m sorry, not the people who failed to come, but the actual people in the room, best practices, is sort of bad news for all the other people because the best practices people are going to establish the floor.

If, in fact, this is not something where you have to wake up Ralph in the old land records, and he goes and gets a big book off the shelf and blows off the dust and looks up where the deed is; if you have got

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existing law or a good faith argument for the extension, modification, or reversal of existing law.”).

63. 11 U.S.C. § 526 (2005).

64. F.R.B.P. 9011.

65. *Id.*

66. *Id.*

67. *Id.*

68. 11 U.S.C. § 526



internet access, everybody has got to do an internet access search for assets or real property, if real property is available, or UCCs if they are available. And areas where they aren't, that's probably not going to be reasonable inquiry. In large metropolitan areas or areas where there's great internet access, you are going to see this become the reasonable inquiry. And there's just a small list of things there. You can read the slides as they go through. They are in the material. They may be in hand-outs, too.

But the point is, all of those things are going to happen naturally because the bar in each community is going to turn out — now I am making up the numbers. If 99 percent of the bar is doing it, and one percent isn't, one percent is clearly not doing a reasonable inquiry. What happens when you get 70/30? I don't know. Can you go down to 51/49? I'm not sure.

It's evolving. It's going to evolve. There are private enterprise groups that are trying to elbow their way in for your business. We will give you a one-step tax review, internet access search. We will give you a land record thing. We will add in a UCC thing. We will throw in the automobile title search, et cetera, et cetera, and we will bundle it for \$14.95. We will do it for \$11.95.

That fight is really going on at large. Maybe tomorrow, the bigger program, you will see the vendors out there who are offering these services. They are, again, elbowing their way past other vendors to offer them. But pretty soon — I don't know how soon; within the next six months, by the end of the full year of the Act<sup>69</sup> — we are going to see some floor established, and it's going to vary around the country. It already does, as I give this presentation.

I get people who say, "We are almost all doing that." Others, "We have never heard of that and can't imagine we are going to do that." We will see. But the point is, no matter how varied it is, there has to be some content that's put into this. And if the local bar won't do it, it's going to be imposed by us because somebody is going to raise the issue.

Some courts have got what are called either Rights And Responsibilities programs; that is, the Court itself, in connection with the bar, establishes standards; everybody who does a 13 does the following things, and the attorney and the client both sign off on it. The Central District of California, Atlanta — there are some published on web sites now. More may spring up. They put a floor down that says, it

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69. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

looks like if you did this, you probably complied with everything that needs to be complied with at a minimum to meet all of these requirements in 526.<sup>70</sup>

And remember, it's a new world, because if the Court determines that you did not do the, quote, "Reasonable inquiry," you expose yourself to all the consequences of failing to do so. So there's a way to control and manage this, I think, even at the court level. It just takes some proactive combination between the bar and the bench on this.

And we are only a couple months away from the start of the October audits from the UST; targeted audits and random audits. If you are the one that gets picked, is your paperwork in clean shape? You got all that stuff that you need? You are — they are desk audits so, as I understand it, all that is going to happen is you are going to get a letter that says, hey, send me all the following hard copies of your electronic filings.

As long as you have them all, great. As long as they meet reasonable inquiry, great. But that's an amorphous concept. And the more flesh that gets put around it now before it gets a life of its own seems, to me, the better it is.

MS. VANCE: A real quick addition to what you said. It's not just 526<sup>71</sup> that people have to be concerned about, but also Section 707(b)(4).<sup>72</sup> And there are hopeless conflicts between these two sections, but 707(b)(4)<sup>73</sup> actually has broader applicability in some respects than do the debt relief agency provisions but, certainly, many attorneys are going to be subject to both.

I would like to ask you, Judge Rhodes, what have you seen in terms of attorneys and how they are behaving and how they have changed what they do, or what's generally your perception from the bench, at least in your district?

HONORABLE STEVEN RHODES: Certainly, there is a small group of lawyers who have not committed to carrying out their responsibilities under the Act.

MS. VANCE: And they advertised on that page.

HONORABLE STEVEN RHODES: No comment on that. It is, however, a small group. I haven't seen any enforcement action regarding them yet. Their clients seem to be suffering the consequences of the attorney's conduct, and it just hasn't been brought to my atten-

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70. 11 U.S.C. § 526.

71. *Id.*

72. 11 U.S.C. § 707(b)(4) (2005).

73. *Id.*

tion in any formal way yet. But, sure, we have dismissed cases because of the failure to file this, that or the other as the statute now mandates.

But having said that, I have to say that on balance, I have been extremely impressed with the commitment that most lawyers have shown to these congressional mandates. Our Consumer Bar in Detroit organized itself into a series of dinner seminars put on by them. They taught themselves what they had to learn and what they had to do under this Act, and it was really an extraordinary and very gratifying thing to see. And more than that, in court, when legal issues have come up under the Act,<sup>74</sup> which they do, the lawyers are putting their lawyers' hats on for the first time in years, and it's wonderful, and they have done a terrific job.

MS. VANCE: Are there any questions? Yes.

AUDIENCE MEMBER: Actually, to the professor on the constitutionality part of the law, and then to Judge Waldron on the rule-making side of it. In the definition of the DRA, a debt relief agency, it appears that the intent was to identify those in the process, those that were the primary providers of the service and not necessarily those that, let's say, under a client/attorney privilege, you may need some things done, and you go out and hire other service providers. So it didn't look, to me, like they were attempting to grab everybody at the trough, but those that had direct contact with the customer or the client. Now, was that in the intent?

And second off to Judge Waldron is, does that work its way through the rule and now the application, and certain providers within this menu of services start to look for ways to be exceptions, to be defined as exceptions?

PROFESSOR CHEMERINSKY: I share your characterization of the statutory provision. The only thing I would add is there is a vagueness to it. I think you are right in terms of what it was about, who it was meant to regulate and not regulate. But I do think part of the constitutional problem with it is how vague the language is. And it's certainly possible to read the statutory provision as bringing in all of those people who are serving, not just those who are doing what we normally think of as debt relief.

AUDIENCE MEMBER: And to add to that, just so I can go to the rule making, if that were the case, if I am not a primary point of sale service provider, but I am somebody back in the pack that is providing

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74. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

services to the attorney, is there a professional obligation on their part to disclose to me that in this case they are acting as a debt relief agency so that I don't get sucked into this or at least say, heck no, I am not going, or is it I should be smart enough to know that that's what they are doing?

PROFESSOR CHEMERINSKY: My sense is you can't answer that on the basis of the statute. That's a question that case law interpreting the statute is going to have to work out.

HONORABLE THOMAS WALDRON: Help me. Who are you? Who are you then in this?

AUDIENCE MEMBER: I would be a service provider for — well

HONORABLE THOMAS WALDRON: Too vague.

AUDIENCE MEMBER: Appraiser.

HONORABLE THOMAS WALDRON: Oh.

AUDIENCE MEMBER: I am talking about — it's one thing to go knowingly; another thing to be drawn in by a trustee, or whatever, and it's another thing to be at the very early part of the food chain before it's actually gone anywhere.

This has a big grab to it, and that's what's scary.

HONORABLE THOMAS WALDRON: Exactly. And I think that Erwin is right. It remains our obligation, the Bench's obligation, to take this language — because, remember, again, although this looks like a definition, that is, 101(12A)<sup>75</sup> says "Debt relief agency," the words that are in "Debt relief agency" are not, as the Supreme Court said in the past, read with the ease of computer. They have to be given some sort of meaning. And the question is, what is that meaning, and does it stop at an appraiser?

If the appraiser is, in fact, part of an entity that's putting together an entire reorganization plan, that is, he or she has not been separately hired just to take a look at 123 Oak Street and file a paper, but is actually someone that says, "Gee, that apartment, sell it, that apartment building, keep it," I think you move much closer to the debt relief agency, and it's intensely factual and somewhat definitional for us to figure out. "Go appraise 123 Oak Street on April 30 and file the report by May 15"; probably safely outside the ambit.

So that's why it — I think this is something that the factual context is going to be more important than the term "I am a third-party provider," or something, or "I am just a resource." It's just too vague.

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75. 11 U.S.C. § 101(12A) (2005).

HONORABLE STEVEN RHODES: It's a fascinating question; one I hadn't contemplated, because a debt relief agency is really anyone who provides bankruptcy assistance, a defined term, to an assisted person, also a defined term. You are really asking, do you come within the purview of bankruptcy assistance? Well, here is the definition: "Any services sold or otherwise provided to an assisted person with an express or implied purpose of providing information, advice, counsel of document preparation or filing, et cetera, or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title."<sup>76</sup>

So if that language is read as broadly as it appears in its, sort of, plain English, maybe you are caught up in there. What a terrible result that would be.

MS. VANCE: Don't forget there is an exception, however.

AUDIENCE MEMBER: That's where I was headed.

MS. VANCE: If it's the debtor's counsel who asks you to go out and look at the house, and tell him how much you think it's worth so he can put it in his schedules, you are an agent of a debt relief agency, and agents of debt relief agencies are not debt relief agencies.

AUDIENCE MEMBER: Right.

MS. VANCE: You have to be careful not to miss —

HONORABLE THOMAS WALDRON: That's why —

AUDIENCE MEMBER: Here is the unintended consequence: I am defined as a bank. I don't have any ATMs on the streets. I don't have drive-throughs, but if you read the definition, I am a financial institution. It makes no sense at all. You have to back up and say, that's a nice unintended consequence. I think I will not deliver my services to you.

So here is another case where all of a sudden, if I am going to be a de facto debt relief agency, where all I did was get hired by the attorney, under attorney privilege, to try to assess something, and maybe he doesn't see yet he needs to disclose to me that he's put on his debt relief agency hat, how am I going to know? I just got sucked into it, unless you take the other way and say anybody in the food chain is one of these agencies.

HONORABLE THOMAS WALDRON: That's why so much of this is going to turn on, I think, the Bench's proper application of these; limiting words in some cases, expanding them in others. The next Panel will talk about that. The "And" becomes "Or", depending on the statute, we read a word in that's missing here, we don't take the

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76. 11 U.S.C. § 101(4A) (2005).

plain meaning there. It's all turning on the kinds of content the Bench is putting into these, I hope, at the earliest stage in getting it off on the right foot.

MS. VANCE: I also learned — we will have time for one more question. But I learned only yesterday that some of this debt relief agency language mirrors language that I think is in the Federal Credit Repair Act.<sup>77</sup> And this came up in a list proposed with respect to what consideration means.

So it's entirely possible that Courts would be able to draw from some consumer protection statute that actually does provide consumer protection and provide meaning. And my understanding under the Credit Repair Act<sup>78</sup> is that consideration has been given a much more limited definition than what you would find in, say, traditional contract law where just about anything that has any value at all is considered to be consideration. And so we might end up having those restrictions.

Sir, last question, please.

AUDIENCE MEMBER: In the statute, the consumer first has to go to a debt counseling agency. If an attorney owns that debt counseling agency and counsels the consumer to make a decision, yes or no, whether they should go to a bankruptcy attorney, and he doesn't handle it, is he swept into this? Now he's referring the case to a bankruptcy attorney, but he happens to be an attorney that owns the debt counseling agency.

HONORABLE STEVEN RHODES: Credit counseling agencies are required under Section 109 to be nonprofit.<sup>79</sup>

AUDIENCE MEMBER: You have nonprofits that have attorneys working for them.

MS. VANCE: If the attorney is working for a nonprofit, then I think that the attorney would be excepted from the debt relief agency provisions by virtue of being an agent of the nonprofit.

HONORABLE THOMAS WALDRON: It's stupid numerical and alphanumeric designations, but it's 12A(b) that says "A debt relief agency does not include," and then "A nonprofit organization that's a 501(c)," and the persons who are under that.<sup>80</sup>

So it tries to take them out of the debt relief agency provisions without regard to whether they are attorneys or not.

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77. Credit Repair Organizations Act, 15 U.S.C. § 1679a(3) (1996).

78. Credit Repair Organizations Act, 15 U.S.C. § 1679 et seq. (1996).

79. 11 U.S.C. § 109(h) (2005).

80. 11 U.S.C. § 101(12A)(B) (2005).

MS. VANCE: Harold, if you are quick, we can take your question before we close.

AUDIENCE MEMBER: My experience has been that the client of the attorney generally requests that appraisal to be done. They tell you they are going to go ahead and file a bankruptcy. But now the judges that I have experienced are sending out letters to the trustees saying, "We expect this, this, and this, and a market analysis;" not defining the market, not defining the analysis, or anything of that sort. And where I am from, we are going to have major, major damages because we have got — Central Indiana is tied to the automobile industry, and 30,000 people out of work there. And I know if this goes on, if there's no definition, I am sure not going to do anything. I am sure the others aren't either, which will put a halt to some of the bankruptcies.

MS. VANCE: I have to say I think there is a potential for my grandma to be a debt relief agency, the way these are worded, and I don't think the courts are really going to let half the planet's population be construed to be debt relief agencies, because then we get chaos. And I trust in the good lawyers to make the proper arguments, and I trust the judges to make reasonable decisions. That's what I think is going to happen because, otherwise, the sky is really going to fall.

I think we are out of time. I want to thank you all for coming. We are five minutes late, but we will have a break.